Comments on Marasco Newton Group Report and the Formation and Functioning of a PCB TMDL Implementation Advisory Committee January 29, 2003

I. INTRODUCTION

The corporate members of the Delaware Estuary TMDL Coalition (the "Companies") wish to thank the Delaware River Basin Commission ("DRBC") and Executive Director Carol Collier for the opportunity to present comments on the formation and functioning of the proposed Implementation Advisory Committee ("IAC") and the report and recommendations presented by the Marasco Newton Group. We appreciate this effort to open up the TMDL process for greater participation by all stakeholders and are optimistic that the proposed collaborative approach can result in a meaningful opportunity to develop creative and cost-effective options for addressing PCBs in the Delaware Estuary. We commend DRBC for its willingness to engage in such a dialogue about the complex issues that need to be resolved to move toward PCB reductions in the Estuary.

The Delaware Estuary TMDL Coalition (the "Coalition") has invested significant time and resources over the past two and a half years in an effort to identify and address the myriad of complex issues posed by the presence of PCBs in the Estuary. The Coalition has endeavored to work cooperatively with DRBC, to share ideas, expertise, and resources. These efforts have been significant and demonstrate the commitment of the Coalition members to the TMDL development process. In addition to active and extensive participation by Coalition members on DRBC's committees and subcommittees, including the Toxics Advisory Committee, the Water Quality Subcommittee, the Tidal Subcommittee and the Implementation Subcommittee, the Coalition (1) sponsored a two-day technical symposium to bring all interested parties up to date on the state of the science relating to the presence of PCBs in the Estuary, (2) retained technical experts (Environ, HydroQual) to assist DRBC and its committees on scientific and modeling issues critical to the TMDL development process, (3) contributed funds to an Academy of Natural Sciences study of the food web in the Delaware Estuary, and (4) provided screening level PCB sampling data using yet to be approved analytical methods with extraordinarily low detection limits.

The Coalition will continue to offer its time and resources to DRBC's efforts through its active participation in all aspects of the process. The Coalition is committed to achieving the goals of the TMDL through a collaborative approach with the full participation of all stakeholders.

II. COMMENTS ON BEHALF OF THE COMPANIES IN THE DELAWARE ESTUARY TMDL COALITION

We are submitting the following comments on the Marasco Newton Group ("MNG") Report and Recommendations of December 2002 ("Report") and on the formation and functioning of an IAC for the Delaware Estuary PCB TMDL. These comments are submitted on behalf of the corporate members of the Coalition. These members include the following companies: Amtrak, The DuPont Company, Exelon Power, Motiva Enterprises LLC, Occidental Chemical Corporation, PSEG-Power, Rohm and Haas Company, Sunoco, Inc., and Valero Refining Company – New Jersey.

A. Commendations on the Report and the Evaluation

The Companies have reviewed and evaluated the Report and collectively agree that the Report contains important insights into the complexity of the tasks that lay ahead and was very well done. Many of the comments and concerns of the Companies as well as other stakeholders in the process have been captured by MNG in the Report and thoughtfully incorporated into the MNG recommendations on the IAC.

We commend DRBC for commissioning this evaluation and pursuing a collaborative approach to addressing the challenge presented by PCBs in the Delaware Estuary. We believe that these actions reflect an appreciation and understanding by DRBC of the need to involve all stakeholders in the process as well as the complexity of the issues surrounding the development of a PCB TMDL for the Delaware Estuary. Some of the more challenging aspects of the effort are the need to take into account the following:

- the achievability of a water quality standard ("WQS") of 44 ppq or less
- the varying criteria among the basin states for issuing fish consumption advisories
- an apparent goal of 2 ppb PCBs in fish tissue
- the actual relationship between fish tissue concentrations and WQS
- the complex nature of PCBs and their behavior in the environment
- the myriad of "sources" of PCBs to consider, quantify and allocate
- the number of jurisdictions involved – three states and two EPA Regions
- the evolving federal regulatory programs and related policies

Properly evaluating these and other factors and striking the appropriate balance in order to move forward to effectively implement strategies aimed at reducing the concentrations of PCBs in the Estuary is the challenge. A collaborative process involving all interested stakeholders committed to the goals articulated in MNG's Recommendations will meet this challenge best.

B. Comments on the Report and Recommendations of MNG

1. Support for a Collaborative, Creative Approach

We agree with and support many elements of the approach recommended by MNG. In particular, we agree that the use of a collaborative, consensus-building process is key to effectively develop a workable TMDL for PCBs in the Delaware Estuary. Also, we support the recommendation that the IAC build upon a common understanding of the complex issues involved, in order to develop a range of potential implementation strategies and programs. This proposed effort should spawn creativity, acting as an incubator for innovative ideas, and result in meaningful progress toward reductions of PCBs entering the water column. The IAC approach and its general purpose is sound based upon our experience in other forums and it should make a meaningful contribution to the process.

2. Composition and Functioning of the IAC

We support the recommended number of participants and composition of the IAC and believe that it will provide the necessary multi-disciplinary representation committed to making this collaborative, consensus-based process successful. However, we believe it is critical to also add a place on the IAC for non-point source ("NPS") representation given the significance of NPS PCB loadings in the Delaware Estuary. If a specific representative cannot immediately be identified, a place should nevertheless be reserved for such a representative in the future.

We also support the MNG recommendations regarding the functions and qualifications of the IAC chair or co-chairs. These are important positions that must be filled by well-qualified and respected leaders. We suggest that, once the IAC is constituted, members interested in assuming the role and responsibility of chair or co-chair volunteer to do so and that the IAC members then select the chair or co-chairs from among the member volunteers. We believe that this process will result in a greater commitment on the part of those members seeking these critically important roles and will further the objectives of the collaborative process.

In addition, we agree with the participation groundrules recommended by MNG. In particular, we strongly support the requirement that each prospective member commit in writing at the outset that they will participate in the IAC process in good faith and that if agreements are reached they will live up to their agreed-to role during implementation. This groundrule will be critical if the IAC is to have, as we believe it should, a meaningful and effective role in developing creative, innovative and cost-effective implementation strategies for a PCB TMDL.

3. Oversimplified Premise for the Issues to be Addressed

We believe that the Report oversimplifies the premise of the current effort to address PCBs in the Estuary. The issues to be addressed in the TMDL and to be

considered by the IAC are far broader than "how best to allocate financial and human resources to address the problem of PCB discharges into the Delaware Estuary." (Vol 2, p.4) The issue to be examined and addressed is the presence of PCBs in the Estuary (including but not limited to any ongoing discharges) and their relationship to water quality standards and fish tissue concentrations. The TMDL has to account for PCBs that are already present in Estuary sediments as well as PCBs entering the Estuary from a myriad of other sources such as air deposition, tributaries, point sources and stormwater. Data is now being collected on all of these contributions. Unless all PCBs in the Estuary are accounted for in the analysis, it will not be possible to effectively address PCBs in the water column or fish tissue through the TMDL.

4. Relationship Between IAC and the Agencies

We are concerned by the discussion in the Report regarding the focus of the IAC and its proposed relationship with the regulatory agencies, which suggests that critical decisions on substantive legal issues central to the development of implementation strategies should be made exclusively by the agencies and then set as parameters on the work of the IAC (Vol 2., pp. 8, 13). We strongly believe that IAC reliance only upon agency interpretation of legal requirements could constrain the IAC process to the point that it could be rendered meaningless. The flexibility existing in the multiple legal and regulatory schemes that are potentially relevant to the TMDL process must be recognized and preserved. The regulatory requirements affecting the process need to be considered and applied constructively to support the IAC's work and its collaborative deliberations. This will be assured by the active involvement of the agency representatives as members of the IAC.

In short, the legal requirements should be used to facilitate the desired result, rather than be presented as an obstacle. However, the process described in Section 1.4, for example, would tend to preempt many of the desired functions of the IAC. Contrary to the process set forth there, we believe that the IAC members should have the opportunity to review and comment on DRBC's summary documents. Likewise, IAC members should have the opportunity to participate in defining the applicable regulatory framework, rather than having the agencies present conclusions as to pivotal regulatory and policy questions such as those identified by MNG. These issues should be open for discussion by IAC members, which will include representatives of the regulatory agencies.

We suggest further clarification of the statement in the Report that "it is expressly not the role of the IAC to renegotiate the scientific work conducted to date." (Vol. 2, p. 16) It is unclear what is meant by this comment. While it is not our expectation that the IAC would engage in an evaluation of the validity of the scientific data generated to date, we believe that discussion of the science cannot be completely divorced from implementation discussions. We believe that the development of strategies and programs for addressing implementation issues necessarily must evolve from a scientific basis and from an evaluation of any scientific uncertainty present in the analysis.

5. Influence of the IAC

A critical factor in the success of the IAC is its potential to influence the regulatory process, an issue also raised by Section 1.4 of the Report. (Vol. 2, p. 13) The function of the IAC and the extent of its influence over the decisions to be made by the regulatory agencies are some of the most fundamental issues that should be defined clearly at the outset. This is especially important since, to the best of our knowledge, the aggressive goals of the DRBC for fish tissue and water column concentrations have not been achieved or even attempted in any watershed. These decisions should not be made in a vacuum and should be considered after obtaining input from the IAC.

6. Schedule of Tasks for the IAC and Timing Issues

The schedule of tasks for the IAC laid out in Section 1.5 of the Report (Vol. 2, pp. 14-16) appears to be a logical and step-wise process for considering the broad range of issues presented in pursuit of TMDL implementation. The IAC is proposed to remain a viable consensus-building entity for up to two years. (Vol. 2, p. 16) We believe that the efficacy and function of the IAC will be significantly compromised if, within the next 12 months, a final PCB TMDL is promulgated with binding wasteload allocations ("WLAs") and load allocations ("LAs"), even if such are characterized as "default" WLAs and LAs. The legal significance of such a decision would likely derail the collaborative process because of the need for interested parties with objections to the TMDL to file appeals or other legal challenges. Thus, we have serious concerns about the role of the IAC under these circumstances and we urge DRBC to constitute the IAC as quickly as possible and to give the IAC the opportunity to explore options for addressing the 2003 TMDL deadline.

III. CONCLUSION

In closing, the Companies believe, based upon the Report, that the members of the proposed IAC will be given a tremendous opportunity as well as responsibility for developing strategies to address the presence of PCBs in the Delaware Estuary. To the extent that the IAC will indeed have such a meaningful role in the TMDL implementation process, we are anxious to participate. We appreciate DRBC's faith in the use of a collaborative process as the most effective method for sorting out and addressing the complex issues presented by the presence of PCBs in the Delaware Estuary.